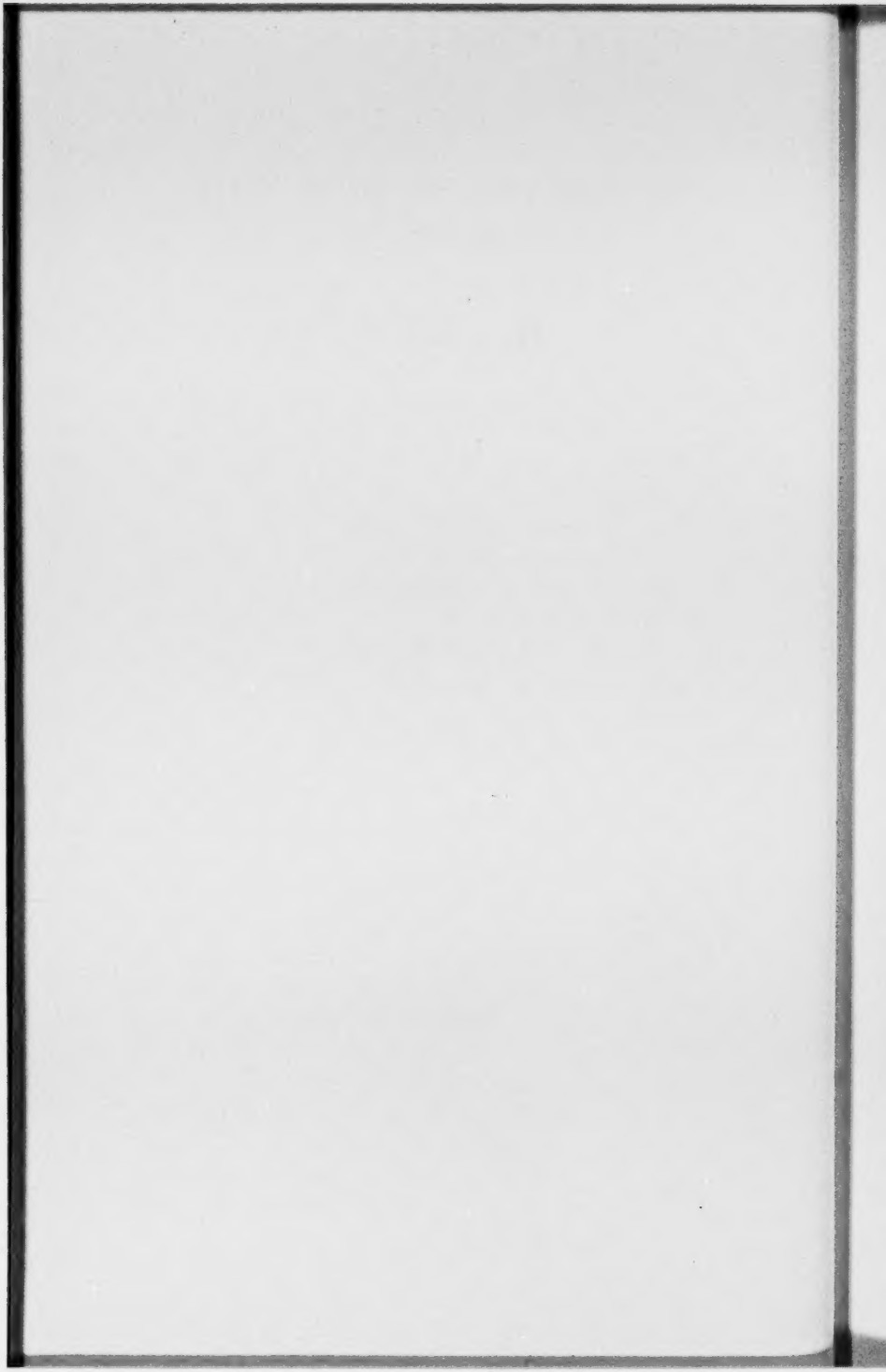

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 498

GEORGE POLAKOFF AND WILLAM ALBERT,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITIONERS' REPLY BRIEF.

Answering Respondent's Brief, pp. 5-8.

The brief for the United States mistakes the contention of the petitioners. The petitioners do not contend that under the pertinent portion of Sec. 135 of the Criminal Code there must be contemplated actual bribery or other corruption of an official. We concede that in some instances misrepresentation and concealment may constitute violation of Sec. 135 of the Criminal Code providing the concealment and misrepresentation relate to material facts and have the effect of influencing the official in the discharge of his duties.

Certainly the acts charged to the accused must have the effect of influencing the official in the discharge of his duties or cause the obstruction of due administration of justice. This is plain common sense and the isolated and few cases cited by the Government support this contention. We need

not speculate whether the adverb "corruptly" modifies the verb "shall endeavor" or the verb "influence".

In *Bosselman* v. *United States*, 239 Fed. 82 (cited by the Government), the defendant requested others to make erasures, changes and insertions in his books and records material to a matter under inquiry by the Grand Jury. Certainly the conduct of the defendant had the effect of obstructing and impeding the due administration of justice and it would be immaterial if the defendant did not bribe the persons to make the changes. In *Astwood* v. *United States*, 1 Fed. (2d) 639, cited by the Government, a surety on the bond of the accused induced the accused not to appear in Court in accordance with condition of her recognizance. Certainly the effect of this conduct was also to obstruct and impede the due administration of justice.

In the case at bar the petitioners are not charged with doing anything concretely that had the effect of influencing the Assistant United States Attorney or obstructing or impeding the due administration of justice. The basis of the charge against the petitioners is extracted from certain words spoken by the petitioner, Polakoff, to the Assistant United States Attorney. The Government points to two statements allegedly made by Polakoff to the Assistant United States Attorney. The first statement was to the effect that the petitioner, Polakoff, told the Assistant United States Attorney that he wanted to clean up all the cases where he had written bail for the defendants and therefore wanted to know "if this fellow Kafton pleaded guilty, if he would receive consideration" (R. 89). This statement, whether true or false, was immaterial and had no effect on the Assistant United States Attorney. The reply of the Assistant United States Attorney, which the Government does not quote, is significant. The Assistant United States Attorney stated that the man was caught red-handed and "he did not care one way or another whether he pleaded guilty or stood trial" (R. 89).

The second statement forming the basis of this charge was the alleged remark made by the petitioner, Polakoff, to the Assistant United States Attorney that his real interest in the Kafton case was that there was some local politician who was interested in Kafton and who was in a position to put men to work (R. 92). This statement, whether true or false, was immaterial and did not have the effect of influencing the Assistant United States Attorney. Here, again, the brief of the Government fails to give the answer of the Assistant United States Attorney. He said to the petitioner, Polakoff, "I told him I was sorry but that the Bureau wanted five years, and five years it was" (R. 92).

Certainly these stupid remarks of the petitioner, Polakoff, if made, could not have the effect of influencing the Assistant United States Attorney or obstructing the due administration of justice. The fact is that it did not have that effect and the Assistant United States Attorney actually paid little or no attention to these voluntary remarks.

We submit that it is impossible to believe that anyone could find anything which was said or done by the petitioner, Polakoff, which even had a tendency to prevent the Assistant United States Attorney from performing his sworn duty. See the dissenting opinions of Mr. Justice Holmes in *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, 424; *Craig* v. *Hecht,* 263 U. S. 255, 281. The reasoning in both these dissenting opinions was followed by this Court. See *Nye* v. *United States,* 61 Sup. Ct. Rep. 810.

In *Craig* v. *Hecht, supra,* Mr. Justice Holmes wrote at page 281:

> "But if there had been, and giving the most unfavorable interpretation to all that the letter says, I do not see how to misstate past matters of fact of the sort charged here could be said to obstruct the administration of justice. Suppose the petitioner falsely and unjustly charged the judge with having excluded him from knowledge of the facts, how can it be pretended that the charge obstructed the administration of justice

when the judge seemingly was willing to condone it if the petitioner would retract?"

How can it be pretended in the case at bar that the statements obstructed the administration of justice or tended to influence the Assistant United States Attorney, when the Assistant United States Attorney paid little or no attention to the remarks and insisted that he would show no leniency (R. 92)?

The Government also calls attention to the fact that the statute prohibits the influencing, obstructing or impeding the due administration of justice. Except for calling this Court's attention to this portion of the statute, no argument is presented that the act charged to petitioners have the effect of obstructing or impeding the due administration of justice. The alleged conduct of the petitioners did not entail any long delay or any large expense in the litigation. No witnesses were corrupted, no records were changed; indeed, Kafton's case was quickly disposed of.

Answering Respondent's Brief, p. 8.

The Government states that the petitioners' contention that there can be no prosecution for a conspiracy "to endeavor" to accomplish the various purposes named in this section, is unavailing. For lack of any other case, the decision of *United States* v. *Russell*, 255 U. S. 138, is cited in support of this generalization.

In *United States* v. *Russell, supra,* defendants were not indicted for a conspiracy to violate Sec. 135 of the Criminal Code. The defendants were charged with violating the substantive offense, the basis of which is "an endeavor" to corruptly influence an officer of any Court of the United States. We still contend that a conspiracy "to endeavor" to commit a crime does not constitute an indictable offense. We contend further that the use of a conspiracy statute in connection with substantive offense, which is in itself an

attempt or an endeavor, is a clear abuse of the conspiracy statute and glaringly unjust.

In the case at bar a cursory examination of the record will demonstrate that the Government attempted to establish the conspiracy by proving the substantive offense,—an endeavor to corruptly influence the action of the Assistant United States Attorney. Under the circumstances, the use of the conspiracy statute involving a punishment much more severe was unauthorized. *Clune* v. *United States*, 159 U. S. 590. Imprisonment for two years for the making of inane and inconsequential remarks, and which was treated as immaterial by the Assistant United States Attorney, is obviously cruel and inhuman punishment. The process by which such a result has been reached should be scrutinized by this Court.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers to the end that rights under the Constitution of the United States should be preserved, and accordingly a writ of certiorari should be granted and the Court should review and reverse the decision of the Circuit Court of Appeals for the Second Circuit.

GEORGE POLAKOFF and
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Petitioners,

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Dated, New York, September 1941.